

United States
Circuit Court of Appeals ³
For the Ninth Circuit.

In the Matter of EARL N. McKINNEY, Bankrupt.

WILLIAM COWAN,

Petitioner,

vs.

JOHN P. CULL, as Trustee in Bankruptcy of the
Estate of EARL N. McKINNEY, Bankrupt,
Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved
July 1, 1898, to Revise, in Matter of Law, a Certain
Order of the United States District Court for the
District of Arizona.

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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In the United States Circuit Court of Appeals for
the Ninth Circuit.

No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bank-
rupt.

Petition for Revision.

To the Honorable the Judges of the United States
Circuit Court of Appeals for the Ninth Circuit:

The petition of William Cowan respectively
shows as follows:

I.

That on the 9th day of April, 1918, Earl N. McKinney filed in the District Court of the United States for the District of Arizona his petition in voluntary bankruptcy, and by judgment of said District Court as aforesaid, was, on or about the 26th day of April, 1918, adjudicated a bankrupt; that thereafter and in due course of the administration of the estate of said bankrupt, one John P. Cull was by proper order and judgment of said United States District Court appointed trustee in bankruptcy for the estate of the said bankrupt, and said John P. Cull ever since has been and is now the duly appointed, qualified, and acting trustee in bankruptcy for said estate.

II.

That thereafter your petitioner was cited to appear as a witness before the Referee in bankruptcy on the 22d day of December, 1919, and testify regarding his several transactions with the said bankrupt; that on said date your petitioner duly ap-

peared as a witness and was examined by said Referee regarding said transactions. [1*]

III.

That thereafter, on the 16th day of February, 1920, said referee ordered your petitioner to appear before him at Douglas, Arizona, on the 8th day of March, 1920, and show cause why your petitioner should not pay over to the estate of the bankrupt the sum of Five Thousand Thirty-eight and 41/100 (\$5,038.41) Dollars.

IV.

That thereupon your petitioner specially appeared, under protest for the purpose of pleading to the jurisdiction of said Referee, and of the said District Court, in the premises, setting forth the grounds for his plea of want of jurisdiction in said Referee and in said Court, which said objection to jurisdiction was overruled by said Referee; and thereupon, under protest, your petitioner filed his answer to the Referee's Findings on Notice to Show Cause, showing among other things the following;

That he had not proved any claim against the estate of the bankrupt; that he did not owe the bankrupt or his estate anything; that any property he had in his possession had been delivered to him by the bankrupt under certain mortgages given by the bankrupt for valuable consideration long prior to the adjudication of the bankrupt in bankruptcy; that suit to foreclose these mortgages had been begun several months prior to adjudi-

*Page-number appearing at foot of page of original certified Transcript of Record.

cations; that while pending there was an accounting and that an agreement for judgment was signed and filed in the pending suit; that subsequent to the adjudication and immediately after his appointment the trustee had been urged to take action relative to the property under foreclosure covered by the mortgages or relinquish any interest in the estate therein; that for more than six months after the adjudication the trustee failed to take any action whatever; that on the 16th day of December, 1918, said Cowan filed his [2] formal judgment in the suit to foreclose; that prior to the date advertised for the sale the trustee brought suit in the Superior Court of Cochise County for an accounting for all the property covered by said mortgages and brought in said Superior Court a second suit to enjoin the sale on execution of the properties covered by said mortgages, on the 13th day of January, 1919, and secured an order from said Superior Court restraining the sale; that these two actions concerned the very matters involved in the show cause order above referred to and covered all the transactions between the bankrupt and said Cowan; that both of these actions were demurred to for want of equity and demurrer sustained; that the trustee appealed to the Supreme Court of the State of Arizona, from the order of the Superior Court sustaining the demurrer, to the action to restrain the foreclosure sale and from an order of said Court dissolving the restraining order, but did not perfect his appeal and dismissed both actions about November 1st, 1919; that the said Cowan thereupon proceeded

to readvertise and sell under his execution; that the expense and upkeep of the property covered by said mortgages, cattle mostly, during said delays, was much in excess of any income derived from them; that the trustee had been guilty of laches and was seeking to profit by the expenditure of time and money by said Cowan in the care of and upkeep of the property in question without offering to do equity.

V.

That thereafter, to wit, under date of May 16th, 1921, the said Referee made certain findings of fact and conclusions of [3] law, finding and concluding your petitioner to be indebted to the estate of said bankrupt in the sum of Four Thousand Seven Hundred Five and 55/100 (\$4,705.55) Dollars, and recommending that the said District Court docket the matter, and render judgment for said sum of Four Thousand Seven Hundred Five and 55/100 (\$4,705.55) Dollars against said William Cowan, and in favor of said John P. Cull.

VI.

That your petitioner immediately after receipt from the Referee of said findings of fact and conclusions of law, filed his certain petition for review in said District Court, moving that the entire proceedings of the Referee relative to the matter and things set forth in the Referee's said findings of fact and conclusions of law on William Cowan's citation, dated May 16th, 1921, and which were mailed on June 22d, 1921 to, and received by, said William Cowan's attorney on June 23d, 1921, be

reviewed upon the grounds and for the reasons set forth in the assignments of error filed herewith and in support hereof, a copy of which petition for review being also filed herewith.

VII.

Such proceedings were had on said petition for Review, that on September 5th, 1922, the said District Court being of the opinion that the Referee was within his rights and had proceeded lawfully in instituting summary proceedings, ordered, adjudged and decreed that the said findings of fact and conclusions of law made by the Referee be affirmed. [4]

VIII.

Your petitioner, considering himself aggrieved by this order of the District Court respectfully applies to this Honorable Court for a revision and review of said order to the end that the said order of the District Court be reversed, and said findings of fact and conclusions of law be revised to show that your petitioner is in no way indebted to the estate of said bankrupt, and that such orders emanate from this Court as are necessary to that end. For this purpose your petitioner has prayed the District Court that the transcript of record, papers and proceedings upon which said judgment or decree was made, duly authenticated, may be sent up to this Court, and your petitioner hereby makes reference to the said transcript of record, papers and proceedings, and hereby incorporates and makes the same a part hereof, to the end that your Honorable Court be enabled to review and correct

the action of the District Court with due care and justice to all concerned.

DAVID BENSHIMOL,
Attorney for Petitioner.

State of Arizona,
County of Cochise,—ss.

David Benshimol, being duly sworn, says, that he is the attorney for William Cowan, petitioner; that he has read the foregoing petition, and that the same is true of his own knowledge, except as to those matters and things set out on information and belief, and as to those, he believes it to be true.

DAVID BENSHIMOL.

Subscribed and sworn to before me this 7th day of October, 1922.

GAYLE H. NICHOLS,
Notary Public.

My commission expires Feb. 23, 1926. [5]

In the District Court of the United States for the
District of Arizona.

No. B-31 (TUCSON).

In the Matter of EARL McKINNEY, Bankrupt.

Assignment of Errors.

Comes now William Cowan, petitioner in the above-entitled matter, and makes and files the following assignment of errors, upon which he will rely upon the prosecution of his appeal from that certain order, judgment, or decree made by this Honorable Court, and entered in the above-entitled matter on the 5th day of September, 1922:

First: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the referee had no jurisdiction in the matter involved, and the said William Cowan specifically objected to, and declared his intention to object to the taking of jurisdiction in said matter by the referee, and has never consented thereto.

Second: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the subject matter involved in the proceedings is not, and was not within the jurisdiction of the referee.

Third: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the said William Cowan has not submitted himself, and does not now submit himself to the jurisdiction of the referee, or this Court, except so far as submission, specially may be necessary for this Court to determine whether it had jurisdiction herein.

Fourth: The Court erred in affirming the findings of fact [6] and conclusions of law made by the referee for the reason that the said referee and this Court have no jurisdiction herein, these proceedings being summary proceedings.

Fifth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that this Court has no jurisdiction in this matter because William Cowan is and was in possession of all the matters and things herein involved as an adverse claimant.

Sixth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the said referee's overruling of objection to jurisdiction made by said William Cowan, was, for the matters herein recited, without legal effect.

Seventh: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that no foundation is laid in said findings of fact and conclusions of law for any summary proceedings herein.

Eighth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the referee had, and has no right to adjudicate upon the matters and things involved herein; that the only person entitled to bring a suit or determine what is to be accounted for, is the trustee; that in such suit said William Cowan would, if he so desired, be entitled to a jury trial.

Ninth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the matters and things involved in said findings of fact and conclusions of law are not based upon any petition for relief, or request to the referee for relief on the part of William Cowan.

Tenth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that [7] there does not appear to have been any application on file in the matter of

this estate on the part of the trustee invoking action by the referee.

Eleventh: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the matters and things involved in the findings of fact and conclusions of law are not based upon any hearing on December 22d, 1919, in which said William Cowan appeared as a party; but it appears that on said date said William Cowan was summoned as a witness to testify as to his transaction with bankrupt.

Twelfth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the trustee, John P. Cull, Esq., has twice begun litigation in the Superior Court of the County of Cochise, State of Arizona, upon the matters and things which are the subject of said findings of fact and conclusions of law, to wit: an action for an accounting entitled "John P. Cull, Trustee, vs. William Cowan," numbered 2818, which action was begun on the 30th day of November, 1918, a certified copy of which is included in the record herein; and an action to enjoin the sale under foreclosures of the properties involved under the mortgages mentioned in said findings of fact and conclusions of law, which action was brought in said Superior Court on or about the 8th day of January, 1919, and is numbered 2861 and entitled "John P. Cull, Trustee, vs. William Cowan and James McDonald, Sheriff of Cochise County," a copy of which is included in the record herein.

Thirteenth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that certain of the findings of fact are based upon deductions of the referee and not upon any evidence, to wit, that there were earnings from the cattle or benefits from the property, [8] when in truth and in fact the holdings in possession by said William Cowan pending the delays by the trustee in determining whether he wished to redeem the property from the mortgages to said William Cowan, for the benefit of the estate; and the litigation started by said trustee and carried to the point of the limit of time to complete appeal to the Supreme Court of the State of Arizona, which litigation was then, to wit, on November 8th, 1919, dismissed; caused expense in excess of the interest accruing upon the mortgages held by said Cowan, and any increase in the number of cattle held; that although said William Cowan bid the amount of his said mortgages and interest, at the foreclosure sale, the trustee did not at any time offer to pay said bankrupt's indebtedness to said William Cowan, or offer to bid at said sale, and there is no evidence showing that the property sold at foreclosure sale was of the value that said William Cowan bid thereon.

Fourteenth: The Court erred in affirming the findings of fact and conclusions made by the referee for the reason that the said findings of fact and conclusions of law are not based upon any evidence upon which to determine that the sum of One Thousand Two Hundred Sixty-five and 58/100 (\$1,265.-

58) Dollars was unaccounted for, for two reasons: (1) that the bankrupt had other dealings with said William Cowan than those involved in the mortgages foreclosed; and (2) that all accounts and matters involving all transactions between said bankrupt and said William Cowan were adjusted and settled in the agreement for judgment signed by the bankrupt on January 8th, 1918; that by the terms of the mortgages and notes, upon which said William Cowan was then foreclosing, the said bankrupt was obligated to pay as attorney's fees thereon, in case suit was brought, the sum of One Thousand Nine Hundred Seventy-four and 59/100 (\$1,974.59) Dollars; that said accounting was completed as to all matters [9] between the bankrupt and said William Cowan and said bankrupt owed said William Cowan the said sum of One Thousand Nine Hundred Seventy-four and 59/100 (\$1,974.59) Dollars, as well as the principal and interest of said mortgages.

Fifteenth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that there has been no fraud and there is no fraud alleged on the part of William Cowan, which would have been ground for these proceedings.

Sixteenth: The Court erred in affirming the findings of fact and conclusions of law made by the referee for the reason that the property involved in the bankrupt's estate, mortgaged to William Cowan, was at the time of the adjudication, and for a long time after, subject to redemption by the

trustee, and that the trustee took no steps to redeem said property, and is guilty of laches.

In order that the foregoing assignment of errors may be and appear of record, the petitioner presents the same to the Court, and prays that such disposition be made thereof as in accordance with law and statutes of the United States in such case made and provided, and petitioner prays a reversal of said order, judgment, or decree appealed from, and each and every part thereof, entered by the United States District Court for the District of Arizona, and a revision of said order, judgment, or decree appealed from, and each and every part thereof.

DAVID BENSHIMOL,
Attorney for Petitioner. [10]

In the District Court of the United States for
the District of Arizona.

No. B-31 (TUCSON).

In the Matter of EARL N. McKINNEY, Bankrupt.

**Petition of William Cowan for a Review of the
Referee's Findings of Fact and Conclusions
of Law on Citation of This Petitioner Dated
May 16, 1921.**

Your petitioner respectfully represents:

1.

That he is the person named in the proceedings herein entitled "Referee's Findings of Fact and Conclusions of Law on William Cowan's Citation," dated May 16th, 1921.

2.

That your petitioner prays the Honorable Court to review said proceedings and the whole thereof. And your petitioner further represents:

3.

That the referee is without jurisdiction and that this Court is without jurisdiction to hear, consider or determine the matters sought to be adjudged in the proceedings before the referee and this Court is without jurisdiction to hear or determine any of the matters and things set forth in the Referee's findings of fact and conclusions of law, dated May 16th, 1921.

4.

That said referee is without jurisdiction and the Court is without jurisdiction of the person of your petitioner in the premises.

5.

That your petitioner has not submitted himself to the jurisdiction of the Referee, nor to the jurisdiction of this Court, and has not consented that the right of property in said proceedings [11] involved; should be determined by said Referee or by this Court, upon summary proceedings herein.

6.

That your petitioner especially denies the jurisdiction of said Referee and especially denies and objects to the jurisdiction of the Court, to proceed further herein.

7.

That said proceedings before the Referee were

arbitrary and unlawful in that same were not initiated upon petition or showing made by the Trustee.

8.

That said proceedings before the Referee and any order or findings sought to be predicated thereupon, were arbitrary and unlawful in that your petitioner's claim to the property and moneys sought to be taken by the Referee, were adverse to the Bankrupt.

9.

That it appears from the findings and conclusions that the Referee is estopped for laches from asserting any claim in behalf of the bankrupt's estate, by reason of failure of the Trustee to redeem the mortgaged property.

10.

That it appears from the findings of the Referee that an attempt is made in summary proceedings to effect and adjudicate an accounting between petitioner and the Bankrupt.

11.

That it appears from the findings of the Referee that an attempt is made to adjudicate matters and issues that can only be determined in a plenary action.

12.

That it does not appear from the proceedings that this petitioner holds any property or moneys of the bankrupt as agent, representative or naked bailee. [12]

13.

That it appears from the record that the matters and things attempted to be adjudicated by the Referee are adjudicated.

14.

That it appears from the proceedings and from the record that all matter and things over which the Referee attempts to exercise jurisdiction, have been determined in a plenary action in a Court of competent jurisdiction.

And your petitioner further represents:

15.

That all moneys and property of every nature and kind whatsoever received by him from said bankrupt or of and from the proceeds of sale upon foreclosure of mortgages are declared by your petitioner to be his own, and same are now and at all times have been held adversely to said bankrupt.

16.

That it appears from the record that a real adverse claim to the property sought to be reached exists in favor of the petitioner.

17.

That there is no evidence in the record to support the findings of the referee and said findings do not support the conclusions of law reached by said referee.

18.

That all the acts, proceedings, orders and findings, so made by the Referee are void and of no effect, and same appears upon the face of the record.

And your petitioner further represents:

19.

That John P. Cull, the duly qualified and acting trustee herein did on November 30, 1918, file his certain action in the Superior Court of the State of Arizona, in and for Cochise County, a court of competent jurisdiction, against this petitioner, said cause being numbered 2818, a certified copy of the record whereof is hereto [13] attached, marked Exhibit "A" and made a part of this petition by reference.

That in said action next before referred to the said Trustee sought an accounting of the defendant in respect to all the matters and things sought to be determined by the Referee in these proceedings, and in which said action the petitioner joined issue by filing his demurrer and answer, and that the issues and matters and things in said action referred to were on May 17, 1919, adjudicated in favor of this petitioner and against said Trustee, and judgment therein in favor of your petitioner has become final.

20.

That John P. Cull, the duly qualified and acting trustee herein did on the 8th day of Jan., 1919, file his certain action in the Superior Court of the State of Arizona, in and for Cochise County, a Court of competent jurisdiction, against this petitioner and against the Sheriff of Cochise County, said cause being numbered 2961, a certified copy of the record whereof is hereto attached, and marked

Exhibit "B" and made a part of this petition by reference.

That in said action next before referred to, the said Trustee sought to restrain this petitioner and the Sheriff of Cochise County from proceeding with the sale under judgment, rendered in mortgage foreclosure proceedings against the properties of the said bankrupt, and setting forth in his said complaint all the matters, things and issues sought to be determined by the Referee in these proceedings and praying for an accounting between the petitioner and said bankrupt in respect to the matters and things considered and attempted to be determined by the Referee in these proceedings, and in which said action this petitioner joined issue by filing his demurrer and answer, and that said restraining order was denied after due proceedings had thereon, vacated and dissolved and thereupon the said Trustee did on Nov. 18, 1919, move the Court to dismiss the said action, and said litigation was determined in favor of this petitioner and judgment thereon has become final.
[14]

21.

That this petitioner excepts to all the acts and doings of the said Referee therein, in this regard, for the reasons hereinbefore set forth.

22.

That your petitioner demands that these proceedings be referred to the United States District Court for the District of Arizona for review.

WHEREFORE your petitioner prays this Honorable Court that all the proceedings of the Referee herein be declared void and that your petitioner go hence without delay.

DAVID BENSHIMOL,
Attorney for Petitioner. [15]

[Endorsed]: No. ——. In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Earl N. McKinney, Bankrupt. Petition for Revision.

Receipt of a copy of the enclosed petition for revision is hereby acknowledged this 30th day of September, 1922.

C. O. MONATT,
Atty. for Defendant in Error.

[Endorsed]: No. 3933. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Earl N. McKinney, Bankrupt. William Cowan, Petitioner, vs. John P. Cull, as Trustee in Bankruptcy of the Estate of Earl N. McKinney, Bankrupt, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, a Certain Order of the United States District Court for the District of Arizona.

Filed October 16, 1922.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.